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BEFORE THE

Federal Communications Commission

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WASHINGTON, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Matter of

Advanced Television Systems
and Their Impact Upon the
Existing Television Broadcast
Service.

MM DOCKET NO. 87-268

ORIGINAL
FILE

To: The Commission

COMMENTS

Brunson Communications, Inc. ("Brunson"), the permittee of television station WGTW, Channel 48, Burlington, New Jersey, hereby provides the following comments in response to the Commission's Second Report and Order/Further Notice of Proposed Rule Making in this proceeding, FCC 92-174, released May 8, 1992 ("Further Notice").¹

Brunson's comments are directed specifically to the Commission's proposal to rank eligible advanced television ("ATV") applicants in the event that there is insufficient spectrum to accommodate all of the groups within the class of eligible applicants. Brunson strongly disagrees with the proposal set forth in the Further Notice that permittees which had not

1 Brunson previously filed comments in response to the Notice of Proposed Rule Making, 6 FCC Rcd 7024 (1991) ("Notice"), in the above-captioned docket.

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completed construction of their stations as of the date of the Notice (November 8, 1991) would be ranked below licensees and permittees that were already on the air as of the date of the release of the Notice, in the event that there were insufficient spectrum to accommodate all eligible broadcasters. Brunson submits that there is no rational basis for making a distinction between licensees and permittees which have received program test authority and those who had not initiated program tests as of that date. The Commission should treat all such licensees and permittees on an equal basis, and should not discriminate against permittees actively engaged in constructing their stations, especially in view of the fact that many of the more recent permittees, like Brunson, are minority owned and controlled.

The Commission decided in the Further Notice at paragraph 8 that the following classes of existing broadcasters would be eligible for ATV channels: (1) all full-service television station licensees; (2) permittees authorized as of the date of the Notice; and (3) all parties with an application for construction permit pending as of the date of the Notice. Brunson certainly agrees with the inclusion of permittees in the eligible group. After deciding this issue, however, the Commission sought comment on how it should award ATV channels among this group of "existing broadcasters" in the event there is insufficient spectrum available in a market to allow for all eligible applicants to receive an initial ATV channel allocation. Among

the groups included within the class of "existing broadcasters," priority would be accorded in the following order: (1) licensees and permittees with constructed facilities having program test authority (apparently issued as of the date of the Notice); (2) permittees; and (3) applicants.

The Commission attempted to justify distinguishing between permittees with program test authority and those without program test authority on the basis that the additional operational experience of those permittees with program test authority supposedly makes them more likely to provide better ATV service to the public:

In affording priorities in the event of insufficient spectrum, we agree with those commentators who would rank eligible parties according to their degree of experience as NTSC broadcasters. Such a rule would harmonize with our fundamental reason for initially restricting eligibility, to bring ATV to the public in the most expeditious and nondisruptive manner. It would do this by enabling those with relatively greater experience and expertise in broadcasting to deliver ATV service to the public first.

Further Notice at para. 8. Brunson submits, however, that the Commission's stated rationale bears no rational relationship to this discriminatory distinction between types of permittees, especially where that distinction is based on whether program test authority was issued prior to the date of last November's Notice. The fixing of November 1991 as the deadline for having initiated program tests to be entitled to the highest ranking is completely arbitrary for the purpose here proposed.

In Brunson's case, for example, Brunson's NTSC television station will be initiating program tests within the next month. Yet the earliest that ATV operations will be initiated on any new ATV channels will be at least three or four years from now. Four years from now, the "broadcast experience" of Brunson's station will be not appreciably different from the "broadcast experience" of a station that signed on the air eight months ago.

Thus, the distinction used here by the Commission appears to be an arbitrary means of reducing the number of eligible applicants in the top priority class rather than a rational means of distinguishing between eligible applicants. By contrast, a more rational basis for distinguishing among eligible applicants on the basis of NTSC broadcasting experience would be to include in the top priority group all those with such experience as of the time that ATV applications are to be accepted for filing some years hence. But the Notice's release date is an arbitrary point in time with no relationship to the stated purpose of the cut off.

Moreover, the purported reliance on "greater broadcast experience" is not necessarily related to whether program test authority has been granted to a permittee as of last November. Again, the facts of Brunson's own "broadcast experience" -- its President and controlling stockholder has over 25 years of broadcast experience, including two decades as chief operational executive of two different groups of broadcast licensees -- in


and of themselves demonstrate that the Commission is arbitrarily relying on the "broadcast experience" of a non-human "station" rather than its owners or operators. A permittee of a television station with program test authority but whose owners personally have no significant broadcast experience cannot rationally be said to be more likely to provide ATV service than a permittee whose owners have a quarter century of broadcast management experience and are actively putting their station on the air in 1992. It is people who have expertise in broadcasting, not stations.

Indeed, the arbitrary November 8, 1991, cut-off date for the top priority group has a discriminatory effect against minority owned and controlled broadcasters such as Brunson. Due in part to the Commission's minority ownership enhancement policies, a higher percentage of those with outstanding permits are minority-controlled, as compared to the percentage of minority-controlled licensees of existing stations. Thus, the weight of the Commission's proposed arbitrary early cut-off falls most heavily on minority-controlled television station permittees. As set forth above, however, there is not even the slightest of rational bases for the Commission to implement a rule this discriminatory.

For the above reasons, in those cases where there is a shortage of available spectrum, the Commission should not place permittees which initiated program tests after the release of the Notice in a second-class citizenship status with respect to

the awarding of HDTV frequencies. Rather, both permittees and licensees should be placed on equal footing in qualifying for the available HDTV authorizations.

Respectfully submitted,
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